BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDELL ANDERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,408
SCARLETT AUTO INTERIORS	)	
Respondent	)	
AND	)	
	)	
STATE FARM INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 14, 2001, Award of Administrative Law Judge Brad E. Avery. Claimant was awarded a 28.5 percent permanent partial disability to the body as a whole after the Administrative Law Judge found that claimant's accidental injury had arisen out of and in the course of his employment with respondent and was not the result of a personal risk. The Appeals Board held oral argument on December 18, 2001.

APPEARANCES

Claimant appeared by his attorney, L. J. Leatherman of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. It is noted that, during the regular hearing, the parties agreed that Phillip L. Baker, M.D.'s report indicated a 15 percent preexisting functional impairment from the total 20 percent impairment provided, with 5 percent resulting from the January 6, 1999, accident. However, a review of Dr. Baker's report of January 28, 2000, actually reveals that Dr. Baker opined claimant had a preexisting impairment of 5 percent, with 15 percent coming from the current January 6, 1999, accident. The parties stipulated at oral argument before the Board that the 5 percent preexisted and the 15 percent is claimant's additional functional impairment out of the total rating of 20 percent to the body as a whole.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?

(2) What is the nature and extent of claimant's injury and/or disability?

(3) Should Dr. Baker's report be limited to claimant's functional impairment or is the entire report to be included in the record including Dr. Baker's opinion regarding the cause of claimant's ongoing problems?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant, an employee of respondent for 22 years, worked in respondent's auto upholstery shop, installing headliners, carpets, upholstery on seats, etc. His job required that he crawl in and out of cars on a regular basis and, while inside the vehicles, crawl around installing headliners, carpets, seats, etc.

Claimant acknowledged a long history of ongoing back problems for which he received chiropractic care for many years. Claimant had, prior to January 6, 1999, experienced pain in his low back with occasional radiculopathy into his hips. However, on the date of accident, while climbing into a vehicle, claimant experienced a sudden pain in his back with radiation, for the first time, into his right leg.

Claimant was treated by Timothy Bolz, D.C., a chiropractor, and was later treated by orthopedic surgeon Michael L. Smith, M.D. Dr. Smith first saw claimant on January 29, 1999, and diagnosed spondylolisthesis with L5-S1 spondylosis, degeneration at the same level and a condition described by Dr. Smith as vacuum disc phenomenon which he identified as a degeneration of the disc. Attempts at conservative care were unsuccessful, and Dr. Smith recommended surgery which claimant underwent on May 24, 1999. The surgery was performed at the L5-S1 level and involved a spinal fusion with a right iliac bone graft.

After the surgery, claimant was unable to return to work with respondent. Before the regular hearing, claimant had applied at four places for work. He acknowledged, at the regular hearing, that he considered himself retired and was no longer looking for work. Claimant was released from medical care in December of 2000, with the regular hearing occurring February 8, 2001.

Claimant was referred by Dr. Smith for a functional capacity evaluation (FCE) on December 21, 1999. This FCE was utilized by Dr. Smith in deciding what restrictions claimant required.

Claimant was referred to Dick Santner and Bud Langston, both vocational rehabilitation experts, regarding the tasks claimant performed during the 15 years preceding his accident with respondent.

Both task lists were placed into evidence at the time of Dr. Smith's deposition. Dr. Smith, while discussing Mr. Santner's task list, opined that claimant was unable to perform task number 1 but was able to perform tasks 2 through 6, for a 17 percent loss of task performing abilities. Dr. Smith discussed, in part, the task list provided by Mr. Langston but, at no time, discussed the entire task list in detail and provided no opinion regarding what percentage of those total tasks claimant was now unable to perform. Dr. Smith was the only physician to give an opinion on claimant's task loss.

Mr. Santner opined claimant was capable of earning $320 per week. This, when compared to the stipulated average weekly wage of $533.20, results in a 40 percent loss of wage earnings. Claimant's expert, Bud Langston, did not express an opinion regarding claimant's ability to earn wages post accident.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.

The Administrative Law Judge in the Award found claimant had suffered a 5 percent functional impairment as a result of this January 6, 1999, accident. The Administrative Law Judge stated that the parties had stipulated to that functional impairment. However, a review of the record and a discussion with the counsel at oral argument clarified that the stipulation involved a 20 percent whole body functional impairment of which 5 percent preexisted claimant's January 6, 1999, accident. This resulted in an additional 15 percent functional impairment as contained in the January 28, 2000, medical report from orthopedic surgeon Phillip L. Baker, M.D. The Appeals Board, therefore, finds, based upon the report of Dr. Baker and the parties' stipulation, that claimant suffered an additional 15 percent functional impairment to the body as a whole as a result of this accident.

The phrase "out of" employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury. And injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while a worker was at work in his or her employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

The uncontradicted evidence in this case is that claimant suffered additional injury to his low back while climbing into a Chevrolet Suburban at work. At that time, he heard a pop in his low back and felt immediate pain in his back with radiculopathy into his right leg. As climbing in and out of vehicles, moving vehicles and installing headliners, carpets, upholstery, etc., were part of claimant's job, the Appeals Board finds that claimant has proven that he suffered accidental injury arising out of and in the course of his employment.

Respondent's contention that claimant suffered a preexisting condition is supported by the record. However, it is well-established under the workers' compensation law in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). In this instance, the medical evidence supports a finding that claimant's preexisting back condition was permanently aggravated by the incident of January 6, 1999. This permanent aggravation is supported not only by claimant's testimony but also by the opinion of Dr. Phillip Baker in his January 28, 2000, report. While respondent contends Dr. Baker's report was allowed into the record only for the purpose of Dr. Baker's functional impairment, that contention is not supported by the record. Dr. Baker's report was included in Claimant's Exhibit Number 2 to the regular hearing, which was admitted into evidence without objection. While respondent objected to the use of Dr. Baker's report at the Bud Langston deposition of March 2, 2001, based upon a lack of foundation, respondent's objection was untimely. The inclusion of Dr. Baker's report in the February 8, 2001, regular hearing record preceded the objection raised by respondent at Mr. Langston's deposition. Therefore, the Appeals Board is free to consider the report in its entirety, including Dr. Baker's opinion that claimant suffered an additional 15 percent impairment to his whole body as the result of the injury on January 6, 1999.

K.S.A. 1998 Supp. 44-510e defines permanent partial disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The Board finds claimant has suffered a 17 percent loss of ability to perform the work tasks that he performed during the 15 years preceding his accident. This opinion, based upon the testimony of Dr. Smith, is the only complete and credible opinion contained in the record.

Concerning claimant's wage loss, K.S.A. 1998 Supp. 44-510e must be read in the light of both Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability by refusing to attempt to perform accommodated work which had been offered by respondent and which paid a comparable wage. The Court of Appeals, in Copeland, went on to hold that for the purposes of the wage loss prong of K.S.A. 1998 Supp. 44-510e, a worker's post-injury wages would be based upon his or her ability rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from his or her injuries.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. Copeland, at 320.

Claimant admitted at the regular hearing he was no longer seeking work and considered himself retired. Claimant had only contacted four employers after leaving respondent. The Appeals Board finds this did not constitute a good faith effort to obtain employment. Therefore, a wage will be imputed pursuant to Copeland. As noted above, respondent's expert, Dick Santner, opined claimant was capable of earning $320 per week, which, when compared to claimant's average weekly wage of $533.20, results in a 40 percent loss of wage earnings. The Appeals Board will, therefore, impute that wage when considering claimant's entitlement to a work disability.

K.S.A. 1998 Supp. 44-510e obligates that claimant's task loss be averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In comparing both claimant's 17 percent task loss and claimant's 40 percent loss of wage-earning ability, the Appeals Board finds claimant has suffered a 28.5 percent permanent partial disability to the body as a whole. The Appeals Board, therefore, finds that the Award of the Administrative Law Judge should be affirmed with regard to claimant's permanent partial disability, but modified with regard to claimant's functional impairment stemming from this accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated June 14, 2001, should be, and is hereby, modified with regard to claimant's functional impairment of 15 percent to the body as a whole, but affirmed with regard to the award of a 28.5 percent permanent partial disability to the body as a whole stemming from the injury suffered by claimant on January 6, 1999, while employed with respondent. As claimant's permanent partial general disability exceeds his functional impairment, claimant would be entitled to an award based upon the work disability. Therefore, the Award of the Administrative Law Judge is affirmed as calculated.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: L. J. Leatherman, Attorney for Claimant
Rex W. Henoch, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director